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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. A-545

FORREST ALLEN PARKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

To The United States Court of Appeals
For The Seventh Circuit

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this cause on September 26, 1979. That Court denied petitioner's Petition for Rehearing on December 6, 1979.

OPINION BELOW

The Opinion of the Court of Appeals is not reported, but is appended hereto as Appendix A. The Order denying a rehearing is also appended hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on September 16, 1979; the Petition for Rehearing was denied on December 6, 1979. On December 27, 1979, this Court entered an Order extending the time for filing this Petition to February 4, 1980 (Appendix C). Jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code.

QUESTIONS PRESENTED

1. What is the correct criteria regarding the sufficiency of affidavits of probable cause in support of an application for a search warrant as required by the Fourth Amendment of the United States Constitution?

2. Where a defendant is charged with the possession on stolen goods found within a residence, does he have "automatic standing" to contest a search conducted at said residence?

3. Under what circumstances is an instruction on the possibility of multiple conspiracies required to be given pursuant to this Court's direction in *United States* v. *Kotteakos,* 328 U.S. 750 (1945) where the evidence presented indicates the clear possibility of several different conspiracies?

STATEMENT

A. Conviction and Sentence.

Petitioner was convicted of one count of conspiracy to transport stolen property in interstate commerce in violation of Section 2314, Title 18, United States Code and Section 341, Title 18, United States Code and was sentenced to five years imprisonment.

The United States Court of Appeals for the Seventh Circuit affirmed the conviction. Rehearing was denied.

B. Summary of the Record.

Petitioner was charged in an indictment that named ten co-conspirators, five of whom were indicted as co-defendants. Two of the co-defendants, Joseph Crimi and Robert Eaves, were tried with petitioner, and were found guilty as charged.

The conspiracy was alleged to have existed from December 1974 until "up to, including and after April 1976, the exact date being to the Grand Jury unknown". It was alleged that co-defendants Crimi and Eaves would contact possible buyers to dispose of stolen goods, and that all defendants would use the telephone and automobiles to further the conspiracy and that petitioner and others would "store and conceal stolen goods—at their respective residences".

The stolen goods in issue were alleged to have been taken in *two burglaries,* one occurring at the residence of Ellen Grobe in St. Louis, Missouri on December 14, 1974 and the other occurring at the residence of Jerome and Kathryn Senaiko in Dunn, Wisconsin on October 10, 1975, some 11 months after the Senaiko burglary. The evidence in the case revolved primarily around the attempts of co-conspirator Raymond Bryan to sell the items taken in the Senaiko (Wisconsin) burglary, however, the only items seized from the petitioner's home in St. Louis, were allegedly taken in the Grobe (St. Louis) burglary.

The search of petitioner's residence and of an apartment adjacent to one which he allegedly controlled were conducted pursuant to search warrants which, in turn, were based upon conversations monitored through Court authorized wiretaps. Petitioner, in his pretrial motions, challenged the legal basis for the search warrants on grounds, *inter alia,* of lack of probable cause. Petitioner also moved for severance contending that certain evidence (that pertaining to the Wisconsin burglary) would be irrelevant and prejudical as to him.

At the pretrial hearing on the motions, an FBI agent testified as to execution of the warrant at petitioner's residence and indicated that the agents did *not* find the items designated in the application for the search warrant (primarily, the items stolen in the Wisconsin burglary in 1973), but instead found and seized items stolen from the Grobe residence in St. Louis in 1974.

In the search of the apartment, also located in St. Louis, the agents seized a suitcase in which numerous wax seals and several items of flatware were found. A Government witness contended that petitioner admitted paying rent on the adjacent apartment, and another witness testified that a female occupant of the adjacent apartment was seen moving the suitcase into the premises shortly after the agents had searched petitioner's home. Stipulated testimony indicated that petitioner's fingerprint was found on a silver butter knife in the suitcase.

After submitting testimony from the burglary victims, the Senaiko's and Mrs. Grobe, the Government produced several alleged co-conspirators. Joseph McGirr, testified that he and Tommy Sargis, together with Ray Bryan and Roy Aldrich, had met in Florida in February, 1976 and negotiated the sale of a Tiffany lamp, identified as stolen in the Wisconsin burglary, as well as other Tiffany items. He further testified that about 50 pieces of Tiffany were brought back to St. Louis.

On cross-examination, however, McGirr stated that he did not know either petitioner or his co-defendant Joseph Crimi, and that he had never seen the items allegedly stolen in the St. Louis burglary and found in petitioner's residence some 16 months later. At this juncture the defendants made a continuing hearsay objection to the testimony of McGirr and other witnesses relating to conversations of persons other than the defendants then on trial. Their objections were overruled despite the fact that the Court made no findings regarding the existence of a conspiracy, or the defendant's participation therein.

Other alleged co-conspirators who testified were Florida antique dealers, but their dealings were also with Ray Bryan and Joe McGirr and neither of them knew or could identify Crimi or petitioner.

A major portion of the Government's case was the introduction of tape recorded conversations pertaining to the transportation of the lamps and other Tiffany items which were monitored over the Court authorized wiretap. Over the petitioner's continuing objections based on hearsay and the issues raised in the pretrial motions, the Court allowed the jury to hear the tapes and read from transcripts prepared by the Government.

The prosecution then produced a St. Louis, Missouri police officer and three F.B.I. agents who testified regarding surveillance of conspirators Raymond Bryan and Norman Owens, and petitioner. Testimony as to the conduct of Bryan and Owens were objected to as being the conduct of other persons, but the Court overruled the objection without making a finding regarding the existence of a conspiracy or any of the defendants' participation therein.

Agent Schultz later testified regarding the search of petitioner's home and stated that during the search he heard petitioner phone his attorney and say "They're after the lamps". The Government argued that this statement implicated petitioner in the conspiracy involving Tiffany lamps stolen in Wisconsin.

On cross-examination, however, Schultz admitted that the only items in evidence which were seized from petitioner's home were items allegedly taken in the Grobe burglary in St. Louis, and he further acknowledged that there was a 16 month time span between the Grobe burglary and the seizure of the items from petitioner's home. There was no evidence that the items from the St. Louis burglary had ever been transported out of the St. Louis area or in Interstate Commerce. Finally, evidence

was presented that both petitioner's and Ray Bryan's fingerprints were found on one of the items taken in the St. Louis burglary and that petitioner's fingerprint was found on a silver butter knife (not shown to be stolen) which was found in the suitcase at the Upton Street address.

At the conclusion of the trial, Petitioner's renewed motion for severance was denied. Additionally, Petitioner requested, but was denied, several important instructions including an instruction on the possibility of multiple conspiracies pursuant to this Court's opinion in *United States* v. *Kotteakos,* 328 U.S. 750 (1945).

The jury found the petitioner guilty of the conspiracy alleged and the Court imposed sentences of five years on petitioner, eighteen months on Crimi and probation on Eaves.

The Court of Appeals affirmed the conviction.

REASONS FOR GRANTING THE WRIT

I.

The Decision of the Court of Appeals For the Seventh Circuit Conflicts With the Decisions of the United States Supreme Court and Other Circuit Courts of Appeals As to the Sufficiency of Information Contained In Affidavits to Support a Finding That Probable Cause Exists to Conduct a Search and Seizure and the Ability of An Individual to Assert Standing to Contest a Search Where He Is Charged With Possession of the Products Thereof.

Petitioner moved to suppress the fruits of two searches conducted after the issuance of search warrants on April 6, 1976 and April 8, 1976. This motion was overruled as were his continuing objections to the evidence during the course of the trial. The warrants authorized the search of the following residences:

April 6 warrant - 8117 Morganford, St. Louis, Missouri (Petitioner's Residence)

April 8 warrant - 3761 Upton, St. Louis, Missouri (an apartment)

As petitioner challenges the sufficiency of the affidavits that were submitted in support of the applications for the warrants, the relevant details of the affidavits will be set out in the argument, *infra.* In brief, petitioner contends: (a) relevant case law confers standing on petitioner to contest both searches, contrary to the Court of Appeals Opinion, (b) there was no probable cause for the issuance of the search warrants.

A. Standing

With respect to the petitioner's residence, no objection to petitioner's standing has been raised. However, with respect to the apartment, the Government and the Court of Appeals have contested petitioner's standing. Accordingly, petitioner invites the Court's attention to the following:

(1) Petitioner was charged in a conspiracy indictment alleging as one of the overt acts the possession of stolen goods at the apartment on April 8, 1976;

(2) Agent Schultz had alleged in his affidavit, and the Government introduced testimony at trial, that petitioner told Police Officer Murphy in July 1975 that the apartment adjacent to the Upton Street address "was his place, that he paid the rent, that he was a frequent visitor, and often stayed overnight". Schultz's affidavit goes on to relate observations of petitioner and his vehicle at the Upton address and intercepted conversations of petitioner regarding the residence.

The Court of Appeals held that petitioner lacks standing to challenge the Upton search, reasoning that he alleged no proprietary or possessory interest in the premises, and that since he is not charged with a crime which depends upon his possession of evidence seized at the time of the search, he may not contest it. *Brown* v. *United States,* 411 U.S. 223 (1973), cited by the Court of Appeals, does not support this opinion. The defendants in *Brown* attempted to contest the search of a store in a different state in which they had absolutely no proprietary or possessory interest. This Court noted that in the suppression hearing the defendants alleged no such interest and that no evidence of such an interest was presented. The petitioners instead argued that they had an automatic standing under the possessory-element doctrine of *Jones* v. *United States,* 362 U.S. 257 (1962).

Such is not the case here. At trial the Government asserted that petitioner exercised a property interest in the adjacent apartment as well as in the suitcase found in the apartment searched. The Government also contended that he caused the suitcase to be moved and stored at 3761 Upton. This Court has traditionally held that any possessory interest in the property search provides the "expectation of privacy" necessary to assert standing in a motion to suppress. See e.g.: *United States* v. *Jef-*

fers, 342 U.S. 48 (1956); *Jones* v. *United States,* 352 U.S. 257 (1962). In this case the Government's own affidavits provide a basis for asserting a possessory interest in the Upton address, and the thrust of its prosecution creates a possessory interest in the items found in the suitcase. Consequently, petitioner has standing to contest the seizure of the items. *See, Jones, supra,* p. 263; *United States* v. *Allsenberrie,* 424 F.2d 1209 (7th Cir. 1970).

The Court of Appeals' reliance on this Court's recent decision in *Rakas* v. *Illinois,* ____ U.S. ____ (1979) is also inaccurate. *Rakas* involved the standing of mere passengers in a car to contest a search of the car that resulted in the seizure of property in which they had no possessory interest. Neither defendant was charged with a crime involving the possession of the items seized. *Rakas* is readily distinguishable from petitioner's case on the facts alone, as the Government's case by itself asserts his possessory interest in both the apartment itself as well as the items seized.

B. The Warrants

The affidavit submitted by Agent Schultz was accompanied by copies of five affidavits which were apparently used previously to obtain wiretap authorizations for other persons and other addresses. Although these affidavits are quite voluminous (and, for the most part, repetitive), they contain very little information relative to petitioner or his residence on Morganford. In fact, only two affidavits contain any underlying factual references - the April 6, 1976 affidavit of Agent Schultz and the "Appendix" to the March 3, 1976, affidavit of Agent Schultz.

The following are the extracted references in the affidavits to petitioner and the Morganford address:

Appendix to Affidavit of March 3, 1976

"A. S-4 on February 26, 1976 at approximately 12 noon, revealed that Ray Bryan called Russell Moving and Storage, 771-3111. Telephone was answered by an unknown female. Ray asked if Al Parker was around. Female answered no.

B. S-4 on February 26, 1976 at approximately 6:15 p.m., revealed that Al called Sharon. Sharon stated Ray wants to see you. He has something for you.

C. S-4 on February 26, 1976 at approximately 8:32 p.m. revealed Sharon calls Ray. Ray asked where's the money I was supposed to give to Al. Sharon states the money is in a shoebox upstairs in my closet next to three (3) pairs of shoes. Sharon asked Ray, is Al there yet? Ray states he is not here yet, but I want to have the money ready when he gets here."

Affidavit of April 6, 1976

"8. Said wire interception further revealed that on April 5, 1976 at 4:02 p.m., Ray Bryan calls 314-638-2224 and talks to Al LNU and asked Al where he going to be this evening, and Al said he would be at home and Ray said he would be by to see him.

9. Subscriber information of Southwestern Bell Telephone Company reveals that 314-638-2224 is subscribed to by S. J. Parker, 8117 Morganford, St. Louis, Missouri."

It is apparent that the April 6 affidavit, viewed in a light most favorable to the Government, relates nothing more than that Ray Bryan phoned petitioner on April 5, 1976 and asked if he would be home that evening (para. 8); that petitioner called Ray

Bryan later and asked him to come to his house at 11:00 a.m. the next day; and that about that time on April 6, 1976 Ray Bryan and another individual did in fact visit petitioner's residence.

The earlier affidavit of Agent Schultz, again taken in a light most favorable to the Government, indicates no more than that Sharon Bryan states to Ray Bryan that there is some money for "Al" in a shoebox in her closet.

The foregoing is the total factual information relative to petitioner or his residence that the magistrate had before him in determining to issue the search warrant.

The Court of Appeals merely wrote that "the record compels the conclusion that these premises were 'probably' the place where the stolen Tiffany shades were located." This standard and the conclusion based thereon is contrary to the holdings of this and other courts that probable cause cannot be based upon facts which are totally innocent in themselves, nor can it be based upon the mere conclusion or opinion of the officer that evidence or contraband is "probably" being stored upon the premises. *Spinelli* v. *United States,* 393 U.S. 410 (1909); *Aguillar* v. *Texas,* 378 U.S. 108 (1964); *Lawson* v. *United States,* 9 F.2d 746 (7th Cir. 1925). As noted in such cases as *Aguillar, supra, United States* v. *Ventresca,* 380 U.S. 102 (1965), *Marcus* v. *Search Warrant,* 367 U.S. 717 (1961), and *Spinelli* v. *United States, supra,* the issuance of a search warrant must depend on the judgment of a neutral and detached magistrate and not by "the officer engaged in the often competitive enterprise of ferreting out crime", *Johnson* v. *United States,* 333 U.S. 10, 14 (1948). To apply the criteria applied herein that the circumstances support a conclusion that the items were "probably" in the premises diminishes the standard of "probable cause" long held by this and other courts.

In *Spinelli, supra* the Court noted that "Spinelli's travels to and from the apartment building and his entry into a particular

apartment on one occasion could hardly be taken as bespeaking gambling activity and there is surely nothing unusual about an apartment containing two separate telephones."

Similarly, with regard to petitioner's residence, there was nothing unusual about persons visiting that address or holding money to pay to petitioner. The fact that Ray Bryan was a suspect does not raise such activity to the requirement of probable cause.

Moreover, the intercepted phone conversations on February 26, 1976 regarding the payment of money to petitioner are clearly "stale facts" relative to the proposed search of the residence on April 6, 1976, more than a month later. See e.g.: *United States* v. *Unger,* 469 F.2d 1283 (7th Cir. 1972).

Finally, it should be noted that none of the affidavits indicate why the agents believed the particular items depicted in the application were suspected of being located at petitioner's residence and, in fact, Agent Schultz testified that none of the items depicted were found. The only items seized were items not described in the affidavit or the warrant. Such circumstances in themselves indicate that there simply was no probable cause to support the warrant application.

The affidavit submitted in support of the warrant for the apartment is identical to that submitted for petitioner's residence, but alleges further facts concerning the search of the residence, the fact that a friend of petitioner was observed carrying unidentified items from 3759 Upton to the neighboring apartment at 3761 Upton, the fact that no one was at the apartment over a three-day period, the fact that petitioner was observed visiting the adjacent apartment and claimed that he had rented the apartment, and the fact that petitioner discussed with his attorney "some girl" during which he referred to a potential search and the fact that her apartment was "clean" (para. 30).

Again, the Court of Appeals addressed the issue by writing that "the record similarly supports the magistrate's determination" that probable cause existed to issue the warrant. The record, as shown above, does not support such a finding. It is submitted that the criteria applied by the Court of Appeals is not consistent with the long standing requirement of probable cause. A writ of certiorari should therefore issue to determine whether the criteria applied by the Court of Appeals is consistent with fourth amendment requirements of probable cause.

II

Further Direction Is Needed to Resolve the Conflict Between the Circuit Courts of Appeals and Between the Seventh Circuit Court of Appeals and This Court In Determining When An Instruction On the Possibility of Multiple Conspiracies Is Required to Be Given In a Trial In Which Only One Conspiracy Is Charged. But In Which the Evidence Indicates the Clear Possibility of Several Conspiracies.

As previously noted, petitioner's motions for severance, both prior to trial and at the conclusion of the evidence, were denied. Moreover, during the instruction conference, tendered his proposed instruction to the effect that it would be possible to find multiple conspiracies and, if the jury should so find, then the acts and declarations of one co-conspirator should not be considered against persons not found to be a member of the same conspiracy. (See Devitt and Blackmar, Federal Jury Practice Instructions, 3 Ed., §27.16). The trial court refused this instruction noting that it did so "with great trepidation."

The Court of Appeals ruled against petitioner's contention that the District Court's refusal was reversible error. Its decision was based on its finding that the evidence substantiated the existence of a single, "albeit attenuated", agreement to transport the property stolen in the St. Louis and Wisconsin burglaries in interstate commerce. This ruling fails to take into account

evidence that indicated the possibility that several distinct conspiracies existed and indicates confusion over the degree of evidence necessary to trigger the multiple conspiracy instruction.

Initially, it is obvious that the stolen items in question were taken in two different burglaries, one on December 14, 1974 in St. Louis and the other on October 10, 1975 in Dunn, Wisconsin. All of the alleged co-conspirators who testified referred to items taken in the later burglary and the only activity shown with regard to the earlier burglary was the alleged possession by petitioner in June 1976. Consequently, the very clear probability exists that the two burglaries and the disposition of the goods taken from each were totally unconnected. However, the burglaries and the possession of the various stolen items were charged as part of the same conspiracy and the jury was instructed that if it found any one of the overt acts relating to either burglary, it could find the defendants guilty of the entire conspiracy charged. This was particularly prejudicial to petitioner since the only items seized from his residence in St. Louis were stolen in St. Louis and had not been transported in interstate commerce.

Secondly, even the evidence concerning the attempts to sell certain property in Florida, Illinois and St. Louis, indicates that Bryan was dealing with a number of persons. If, in fact, he dealt with petitioner in an attempt to sell the goods in his possession, his dealings did not necessarily constitute part of the same conspiracy as Joseph McGirr, Dorothy Morse or Roy Aldrich. It will be recalled that these persons, with whom Bryan dealt in Florida, did not even know and had never met petitioner.

It is most probable, therefore, that separate conspiracies existed with these persons and that these conspiracies had nothing to do with any dealings in the St. Louis area. At most, with respect to the items taken in the Wisconsin burglary, the Government's evidence indicated the "wheel" type of con-

spiracy discussed in the leading cases on this issue, Ray Bryan being the hub and certain other alleged co-conspirators participating in separate and isolated transactions. However, the jury was instructed on only a single conspiracy and was permitted, without adequate instructions, to consider the acts and declarations of a number of persons as evidence of the broad conspiracy charged.

In *United States* v. *Kotteakos,* 328 U.S. 750 (1945), the leading case on this issue, this Court recognized the dangers of submitting too much under a single conspiracy theory. In reversing the convictions of thirteen (13) defendants for conspiracy to violate the National Housing Act, the Court stated (at p. 773):

> "There are times when of necessity, because of the nature and scope of the particular federation, large numbers of persons taking part must be tried together or perhaps not at all, at any rate as respects some. When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for the use of every safeguard to individualize each defendant in his relation to the mass. Wholly different is it with those who join together with only a few, though many others may be doing the same and though some of them may line up with more than one group.
>
> *Criminal they may be, but it is not the criminality of mass conspiracy. They do not invite mass trial by their conduct. Nor does our system tolerate it. That way lies the drift toward totalitarian institutions. But our Government is not one of mere convenience of efficiency.* It too has a stake, with every citizen, in his being afforded our historic individual protections, including those surrounding criminal trials. About them we dare not become careless or complacent when that fashion has become rampant over the earth.

> Here toleration went too far. We do not think that either Congress, when it enacted §269, or this Court, when deciding the *Berger* case, intended to authorize the Government to string together, for common trial, eight or more separate and distinct crimes, conspiracies related in kind though they might be, when the only nexus among them lies in the fact that one man participated in all. (Emphasis supplied)

This Court so held, even though there may have been sufficient evidence to support a verdict with regard to separate and distinct offenses. The Court stated (at p. 775):

> "With all deference we disagree with that conclusion and with the ruling that the permeating error did not affect "the substantial rights of the parties." That right, in each instance, was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others as shown by this record.

Petitioner suggests that this case should be governed by the Seventh Circuit's own decision in *United States* v. *Varelli,* 407 F.2d 735 (7th Cir. 1969). In that case the Court discussed at length the problems inherent in charging a single, all encompassing conspiracy when multiple conspiracies are indicated by the evidence. In reversing a hijacking conspiracy, the Court noted that where the evidence indicates more than one conspiracy, severance may be necessary, but at the very minimum a cautionary instruction is needed. The Court stated (at p. 747):

> "Here, while the hijackings were sufficiently related to allow all the defendants to be tried together, there was not sufficient evidence from which it could be concluded that there was one overall conspiracy. *The jury was not properly instructed in order that they could find the defendants guilty. Without being properly instructed, it was possible for the jury to transfer guilt from one to another and to find defendants guilty of an overall conspiracy although*

> *they were only related to the Polaroid hijacking.* We find it necessary to void the convictions of the defendants because their rights were substantially prejudiced by a single trial without proper instructions." (Emphasis supplied)

The requirement of a multiple conspiracies instruction under such circumstances has consistently been recognized in other circuits, see: *United States* v. *Sperling,* 506 F.2d 1323, 1340 (2nd Cir. 1974); *United States* v. *Bertolotti,* 529 F.2d 149 (2nd Cir. 1975), and *United States* v. *Eubanks,* 591 F.2d 513 (9th Cir. 1979).

The prejudice to petitioner by the denial of severance and the submission on a single conspiracy theory is obvious. A great deal of evidence concerned transactions between Ray Bryan and the Florida antique dealers to whom he sold certain items. Additionally, the conversations between Bryan and the three defendants, who did not even know each other, were clearly indicative of separate transactions. Similarly, the only alleged conspirator who was shown to have had any dealings with the items stolen in the St. Louis burglary was petitioner. This burglary occurred in St. Louis and the items were found in St. Louis some eighteen months later. There was no interstate transportation shown and there was simply no connection between these items and the alleged interstate transportation of the Wisconsin items. The possibility of the type of jury confusion and "transferred guilt" referred to in *Varelli, supra,* is apparent.

Considering the existence of evidence which indicates the possibility of more than one conspiracy and the conflict between the Circuits and within the Seventh Circuit in its factual and legal interpretation of this case and *Varelli, supra,* it is submitted that the Court should issue its writ to restate the criteria under which a multiple conspiracy instruction is required.

CONCLUSION

For the foregoing reasons, this Court should issue its Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit to review that Court's judgment and opinion.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

ARGUED: January 18, 1979
September 26, 1979

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. William J. Bauer, Chief Judge
Hon. John F. Grady, District Judge*

United States of America, Plaintiff-Appelle, No. 78-1722, vs. 78-1885 Forrest Allen Parker and Joseph C. Crimi, Defendants-Appellants.	Appeal from the United States District Court for the Southern District of Illinois, Springfield Division. No. 77-Cr-50006 J. Waldo Ackerman, *Judge*

ORDER

On December 12, 1977, a federal grand jury returned a three count indictment charging appellants Parker and Crimi, together with four other individuals, with conspiracy to transport stolen goods in interstate commerce in violation of 18 U.S.C. §§ 2314 and 371. Additionally, appellant Crimi and two of the alleged co-conspirators were charged with a substantive count of transporting stolen property. On March 29, 1978, the jury found appellants guilty as charged in the indictment, and from the judgments of conviction entered on the jury verdicts, Parker and Crimi appeal. We affirm.

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* The Honorable John F. Grady, United States District Court for the Northern District of Illinois, is sitting by designation.

I

Appellants present numerous issues for review, which we shall address *seriatim*. First, appellant Crimi contends the district court erred in denying the motion to suppress evidence obtained from electronic surveillances and in denying a full evidentiary hearing on the motion. We find this contention to be without merit. A review of the challenged application for an Interception Order reveals that it sets forth the information required by law to be contained therein, including the identity of the officer making the application, a statement of the facts relied upon to justify the applicant's belief that an order should be issued, and statements as to why other investigative procedures would not succeed. Crimi nevertheless challenges the affidavit in support of the Order on the grounds that the affidavit contains an insufficient statement of probable cause and insufficient reasons why other investigative methods were ineffective.

We find Agent Quick's affidavit contained a sufficient statement of probable cause. The underlying information given by Lt. McCullough to Agent Quick was credible because the affidavit set forth an adequate reason for believing that the two confidential informants were credible and reliable, and the factual assertions justified the conclusions which the informants made. *Aquilar* v. *Texas,* 378 U.S. 108, 114 (1964). As to the reliability of the confidential informants, the first informant had given information in the past which had resulted in two prosecutions, his information had been substantiated by other investigations conducted by law enforcement agencies, and he was able to identify photographs of the stolen merchandise shown to him by Crimi. As to the second informant, the police had prior experience with the informant, the information given had been corroborated, and the informant was able to describe an item later found to have been stolen in one of the burglaries which had not been depicted in the photographs. As to the adequacy of the facts stated in the affidavit, most of the information given to Lt. McCullough consisted of admissions made by

Crimi to the informants. The stolen character of the goods was established by the informants' identification of items displayed to them by Crimi as being identical to those depicted in the photographs of the collections stolen in the two burglaries. Interstate transportation was established because Crimi lived in Illinois and the thefts occurred in Missouri and Wisconsin. Value was established by Crimi's offer of $50,000 each for the jade and tiffany lamps, and by the F.B.I. estimation of the value of the goods from the two burglaries as being in excess of $140,000.

Crimi further challenges the sufficiency of the affidavit on the grounds that it did not establish exhaustion of other investigative procedures. We find that the affidavit set out a sufficient factual predicate for the conclusion that other investigative methods were not feasible. In addition to the statement that the informants would not testify, the affidavit stated that Crimi had apprised the informants he would not deal directly with a buyer, thus inhibiting the employment of undercover agents. Even is such a procedure were employed, the affiant stated that Crimi's codefendants would probably not be identified. The affidavit further averred that, due to the nature of Crimi's neighborhood, the investigations would be compromised by conducting a physical surveillance. We thus regard appellant's reliance on *United States* v. *Kalustian,* 529 F.2d 585 (9th Cir. 1976) as misplaced, and conclude that the government complied with the requirements of Title 18 U.S.C. Section 2513(1) (C).

Crimi also contends he was entitled to a full evidentiary hearing into the veracity of Agent Quick's affidavit in the contested Interception Order. We are advertent to *Franks* v. *Delaware,* 99 S.Ct. 2674 (1978), but regard it as inapposite to the circumstances presented here. In this case, there was no showing by Crimi that any statement made by Agent Quick in his affidavit was false. Nor was there any offer of proof that the other individuals present at the drafting of the affidavit would testify that Lt. McCullough did not tell Agent Quick what the affidavit

stated he told the agent. Moreover, Crimi's alleged offer of proof as to the "denominated informants" did not establish the substantial showing that his witnesses would testify to the facts which he asserted as true, as mandated by *Franks,* or as required under the more restrictive tests enunciated in *United States* v. *Carmichael,* 489 F.2d 983 (7th Cir. 1973) and *United States* v. *Anderson,* 542 F.2d 428 (7th Cir. 1976). Thus, we conclude the district court did not abuse its discretion in denying Crimi's motion for a full evidentiary hearing into the veracity of the affidavit.

II

Appellant Parker challenges the district court order denying his motion to suppress certain evidence seized pursuant to the execution of search warrants at 8117 Morganford Street and 3761 Upton Street in St. Louis, Missouri. As a preliminary matter, we hold that Parker lacks standing to challenge the search of the 3761 Upton Street residence. Parker alleged no proprietary or possessory interest in the premises at 3761 Upton, and since he is not charged with a crime which depends upon his possession of the evidence seized at the time of the search, he may not contest the search. *Brown* v. *United States,* 411 U.S. 223 (1973); *Rakas* v. *Illinois,* 99 S.Ct. 421 (1978).

As regards Parker's challenge to the sufficiency of the affidavits supporting the issuance of the search warrants, we conclude the warrants were based on a finding of probable cause. Although the objects of the search at the Morganford residence were not located as a result of that search, the record compels the conclusion that these premises were "probably" the place where the stolen tiffany shades were located. The record similarly supports the magistrate's determination to issue the warrant for the search of the premises at 3761 Upton Street.

Parker also challenges the scope of the search at the Upton residence, claiming the search of the contents of the gym bag

seized at the Upton Street residence was unlawful. We find this contention, raised for the first time on appeal, to be without merit. The affidavit stated that an unindicted co-conspirator made four trips to the 3761 Upton residence carrying various containers, including a "black round leather bag." It is therefore reasonable to believe the search of the bag and the seizure of the items contained therein were contemplated when the warrant was sought. Accordingly, the search of its contents was clearly within the scope of the warrant. The cases relied upon by the appellant are inapposite, as each involved a warrantless search.

III

Appellants argue that the items stolen from the Grob residence and subsequently found in the Parker residence were improperly admitted into evidence. We regard the admission of these antiques as relevant and material to the crimes charged, and conclude that their probative value was not substantially outweighed by the likelihood of prejudice. *See United States* v. *Abraham,* 541 F.2d 1234, 1240 (7th Cir. 1976), *cert. denied,* 429 U.S. 1102 (1977). The antiques from the Grob and Sinaiko thefts discovered in Parker's residence serve as evidence of the existence of a conspiracy and as circumstantial evidence of Parker's participation in the conspiracy to store, transport, and dispose of stolen property. The fact that one of the antiques bore the fingerprints of the co-conspirators, together with the contacts between Parker and co-conspirator Ray Bryan, who had transported interstate some of the articles from the same thefts, provide the nexus between some of the co-conspirators and some of the antiques with the broader conspiracy. Thus, even if, as the appellants contend, the Grob antiques recovered from the Parker residence may have been insufficient evidence, standing alone, to prove a conspiracy, they do serve as an integral part of the entire scheme to transport stolen property in interstate commerce.

Nor is the fact that all of the goods discovered in Parker's residence may not have been transported interstate controlling. Since the Grob antiques were commingled with the Sinaiko antiques, which had in fact been transported across state lines, the Grob antiques were admissible to demonstrate the existence and operation of the conspiracy. *See, e.g., United States* v. *Bastone,* 526 F.2d 971 (7th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976). Thus, although the Grob items may only have been transported interstate, Parker's possession of these goods is relevant evidence of his participation in the larger conspiracy to transport the goods interstate for purposes of disposition. *United States* v. *Greer,* 467 F.2d 1064 (7th Cir. 1972), *cert. denied,* 410 U.S. 929 (1973).

Moreover, the fact that Parker was not charged with personally transporting the antiques in interstate commerce does not preclude the admissibility of the Grob antiques into evidence. Parker's storage of the goods established the permissible inference that this conduct was merely one step in a total scheme of interstate transportation. Since other items stolen from the Grob home were eventually transported interstate to Nevada and Florida, it was reasonably foreseeable that other items from the Grob theft in Parker's possession would be transported in like manner in the near future. *See United States* v. *Knippenberg,* 502 F.2d 1056 (7th Cir. 1974). We therefore conclude the admission of the Grob antiques was proper as evidence of the existence and operation of the broader conspiracy to transport stolen property in interstate commerce.

V

Appellants also contend the district court erred in admitting into evidence certain statements and acts of their co-conspirators. First, appellants argue the court improperly instructed the jury concerning the admissibility of the co-conspirators' declarations and acts. Although the appellants filed a timely objection to the testimony of one co-conspirator

and suggested, after being overruled on the objection, that the court give some type of limiting instruction, the appellants neither elaborated on that request nor tendered such an instruction at the time the testimony was given. However, the appellants did tender such an instruction at the next recess, which the court adopted and read to the jury. But at no other time did the appellants request that the court repeat the cautionary instruction, and we therefore conclude that the court did not err in instructing the jury as to the admissibility of the challenged evidence.

Appellants further contend that the court improperly submitted the question of the admissibility of the co-conspirators' declarations to the jury rather than determining for itself that there was sufficient evidence of a conspiracy. We are advertent to our decision in *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978), in which we held that such a determination was properly a matter for the court, not the jury. However, *Santiago* was decided subsequent to the district court ruling in this instant case, and we decline to apply *Santiago* retroactively to this appeal. The district court applied the then prevailing standard to the question of admissibility, as set forth in *United States* v. *Santos,* 385 F.2d 43 (7th Cir. 1967), *cert. denied,* 390 U.S. 954 (1968). Appellants failed to object to the application of this standard at trial, and we do not regard their arguments advanced on appeal to be persuasive. We therefore conclude that, without the benefit of our decision in *Santiago,* the district court's use of the traditional standard was not plain error.

VI

We have examined the appellants' other arguments and in view of the record, find them equally devoid of merit. The judgments appealed from are affirmed and the Clerk of this Court is directed to enter judgment accordingly.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

December 6, 1979

Before

Hon. Thomas E. Fairchild, Chief Judge
Hon. William J. Bauer, Circuit Judge
Hon. John F. Grady, District Judge *

United States of America,
Plaintiff-Appellee,
Nos. 78-1722, 78-1885 vs.
Forrest Allen Parker and
Joseph C. Crimi,
Defendants-Appellants.

Petition for Rehearing and Suggestion for Rehearing *En Banc.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Forrest Allen Parker, IT IS ORDERED that the Per Curiam Order of the original panel dated September 26, 1979 be, and the same is hereby, AMENDED by inserting the following paragraph on page five at the conclusion of Part IV of that Order:

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* The Hon. John F. Grady, Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Nor do we regard as error the refusal of the district court to give the appellants' tendered jury instruction 19C concerning multiple conspiracies. Viewed in the light most favorable to the Government, *Glasser* v. *United States,* 315 U.S. 60 (1941), the evidence adduced at trial substantiated the conspiracy count of the indictments as a single, albeit attenuated, agreement among various parties to perform different functions in order to effectuate the unitary objective of the conspiracy—the interstate transportation of property stolen from the Grob and Sinaiko residences for purposes of sale. Although appellants Parker and Crimi apparently neither met nor spoke with each other during the course of the conspiracy, their overt acts in furtherance of the scheme established the requisite nexus to the conspiracy. For example, the evidence showed that appellant Parker was in possession of property stolen in both thefts. Appellant Crimi endeavored to locate purchasers and negotiate sales of the property stolen in both thefts, and Crimi's automobile was used by co-conspirator Bryan to transport property from both thefts to Florida where Bryan effected the sale of items from both thefts. Thus, we find the evidence sufficient to establish a single conspiracy to transport stolen property in interstate commerce and therefore regard as inapposite the cases relied upon by the appellants in support of their claim to a multiple conspiracies instruction. Accordingly, we conclude the district court properly declined to so instruct the jury.

Upon further consideration of Defendant-Appellant Parker's petition for rehearing and suggestion for rehearing *en banc,* no judge in active service having requested a vote thereon,* and all of the judges on the original panel having voted to deny a rehearing, IT IS FURTHER ORDERED that the petition for rehearing in all other respects be, and the same is hereby, DENIED.

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* The Hon. Harlington Wood, Jr., did not participate in any consideration of the petition for rehearing *en banc.*

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-545

Forrest Allen Parker,
Petitioner,

v.

Unites States

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 4, 1980.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 27th
day of December, 1979.